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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 MARIA TERESA SCOTT, ) CV 08-4467 RSWL (FMOx)  
12 Plaintiff, )  
13 v. ) ORDER GRANTING  
14 ) DEFENDANT'S MOTION FOR  
15 SUBCONTRACTING CONCEPTS, ) SUMMARY JUDGMENT  
16 INC. AND DOES 1-10, )  
17 Defendant. )  
18 )

19 I. Background

20 Plaintiff Maria Teresa Scott ("Plaintiff") began  
21 performing services as a delivery driver with a company  
22 named California Overnight in Inglewood, California  
23 around June 2003. Plaintiff served as a utility driver  
24 who performed replacement services for other drivers  
25 who were not able to handle their routes. In or around  
26 2005, Plaintiff switched from being a utility driver to  
27 having a fixed route where she would handle deliveries  
28 in a specified area. In or around September 2006,

1 Plaintiff switched her route from Inglewood to Burbank.

2 Plaintiff stopped performing services for  
3 California Overnight around October 2007. A couple of  
4 months later, California Overnight offered to allow her  
5 to resume her services as an independent contractor.  
6 She declined this offer.

7 Defendant Subcontracting Concepts, Inc.  
8 ("Defendant" or "SCI") is a third party administrator  
9 that provides services in connection with a client's  
10 use of independent contractors. Contractually, SCI  
11 performs administrative services for California  
12 Overnight, including the processing of settlement  
13 payment checks and 1099 forms for the drivers who  
14 perform delivery services. Information from  
15 Subcontracting Concepts, Inc.'s website describes the  
16 company as a "Primary General Contractor" which  
17 contracts with each driver individually and provides  
18 payee services associated with the subcontractors. SCI  
19 "administers, reviews, and tracks the 1099 reporting  
20 responsibilities for the settlement payments made to  
21 the Independent Contractor." Services SCI performs  
22 include "data processing systems, administrative  
23 support, and legal protection delivered by SCI to the  
24 drivers as well as to the Courier Company."

25 Plaintiff filed her Complaint against  
26 Subcontracting Concepts in Los Angeles Superior Court  
27 on May 15, 2008. The Complaint was served on Defendant  
28 on June 10, 2008, and Defendant timely filed a Notice

1 of Removal on July 8, 2008. Notably, Plaintiff only  
2 brought claims against Subcontracting Concepts and did  
3 not name California Overnight as a party defendant.

4 The Complaint alleges eleven causes of action:

- 5 1. Violation of Federal Wage & Hour Laws, Fair  
6 Labor Standards Act, 29 U.S.C. § 201 et seq.
- 7 2. Willful Violation of Federal Wage & Hour Laws,  
8 Fair Labor Standards Act, 29 U.S.C. § 207
- 9 3. Unpaid Minimum Wages Under California Law, Cal.  
10 Labor Code §§ 1197 et seq.
- 11 4. Failure to Pay Compensation for All Hours  
12 Worked, Cal. Labor Code §§ 1198 et seq.
- 13 5. Unlawful Discrimination, FEHA, Cal. Gov. Code §  
14 12940
- 15 6. Termination in Violation of Public Policy
- 16 7. Sexual Harassment, Gov. Code § 12940 et seq.
- 17 8. Unlawful Retaliation, Gov. Code § 12940 et seq.
- 18 9. Failure to Prevent Sexual Harassment, Gov. Code  
19 § 12940 et seq.
- 20 10. Labor Code Private Attorneys General Act of  
21 2004, Cal. Labor Code §§ 2698-2699.5
- 22 11. Unfair Competition, UCL, Cal. Bus. & Prof. Code  
23 § 17200 et seq.

24 Defendant answered the Complaint on July 14, 2009.  
25 Although Defendant argues that the claims should now be  
26 dismissed on summary judgment, Defendant did not bring  
27 a motion to dismiss at any time during this litigation.

28 Defendant filed this Motion for Summary Judgment on

1 May 1, 2009. Defendant moves for summary judgment on  
2 two grounds: (1) all the wrongful acts Plaintiff  
3 alleges were not committed by Defendant and/or its  
4 agents; and (2) even if the Court declines to dismiss  
5 all of Plaintiff's claims, Defendant is entitled to  
6 summary adjudication on the claims that require an  
7 employer-employee relationship, because there was no  
8 such relationship between Defendant and Plaintiff.

9 The Court entertained argument on this Motion on  
10 July 14, 2009.

## 11 II. Analysis

### 12 A. Legal Standard - Summary Judgment

13 Summary judgment is appropriate when there is no  
14 genuine issue of material fact and the moving party is  
15 entitled to judgment as a matter of law. Fed. R. Civ.  
16 P. 56(c). A genuine issue is one in which the evidence  
17 is such that a reasonable fact-finder could return a  
18 verdict for the non-moving party. Anderson v. Liberty  
19 Lobby, 477 U.S. 242, 248 (1986). The evidence, and any  
20 inferences based on underlying facts, must be viewed in  
21 a light most favorable to the opposing party. Diaz v.  
22 American Tel. & Tel., 752 F.2d 1356, 1358 n.1 (9<sup>th</sup> Cir.  
23 1985).

24 Where the moving party does not have the burden of  
25 proof at trial on a dispositive issue, the moving party  
26 may meet its burden for summary judgment by showing an  
27 "absence of evidence" to support the non-moving party's  
28 case. Celotex v. Catrett, 477 U.S. 317, 325 (1986).

1  
2 The non-moving party, on the other hand, is  
3 required by Fed. R. Civ. P. 56(e) to go beyond the  
4 pleadings and designate specific facts showing that  
5 there is a genuine issue for trial. Id. at 324.  
6 Conclusory allegations unsupported by factual  
7 allegations, however, are insufficient to create a  
8 triable issue of fact so as to preclude summary  
9 judgment. Hansen v. United States, 7 F.3d 137, 138  
10 (9th Cir. 1993) (citing Marks v. Department of Justice,  
11 578 F.2d 261, 263 (9th Cir. 1978)). A non-moving party  
12 who has the burden of proof at trial must present  
13 enough evidence that a "fair-minded jury could return a  
14 verdict for the [opposing party] on the evidence  
15 presented." Anderson, 477 U.S. at 255.

16 The moving party has no burden to negate or  
17 disprove matters on which the opponent will have the  
18 burden of proof at trial. In fact, the moving party  
19 need not produce any evidence at all on those matters.  
20 Celotex, 477 U.S. 317, 106 S. Ct. 2548, 2554 (1986).

21 In ruling on a motion for summary judgment, the  
22 Court's function is not to weigh the evidence, but only  
23 to determine if a genuine issue of material fact  
24 exists. Anderson, 477 U.S. 242. Upon a showing that  
25 there is no genuine issue of material fact as to a  
26 particular claim or defense, the court may grant  
27 summary judgment in the party's favor "upon all or any  
28 part thereof." Fed. R. Civ. P. 56(b).

1       B.   Actions by Defendant SCI

2       Defendant contends that there is no triable issue  
3 of fact concerning who committed the actions complained  
4 of in the Complaint. Defendant argues that the alleged  
5 wrongful acts were not committed by SCI or its agents,  
6 but rather were committed by third-party non-  
7 defendants.

8       Defendant points to evidence showing that Plaintiff  
9 herself has admitted to the following: (1) she was  
10 unaware of anything SCI did other than processing  
11 settlement checks for her and the other drivers  
12 (Defendant's Statement of Uncontroverted Material Facts  
13 ("SUMF") 14); (2) she never met anyone who worked for  
14 Defendant SCI (SUMF 15); (3) she never communicated  
15 with anyone at SCI regarding her delivery services  
16 (SUMF 16); and (4) she only communicated with SCI on  
17 one occasion regarding a letter she needed for an  
18 immigration matter (SUMF 18).

- 19           1.   First Cause of Action for Violation of  
20               Federal Wage and Hour Laws, 29 U.S.C. §  
21               201; Second Cause of Action for Willful  
22               Violation of Federal Wage and Hour Laws,  
23               29 U.S.C. § 207; Third Cause of Action for  
24               Unpaid Minimum Wages Under California Law,  
25               Cal. Labor Code § 1197; and Fourth Cause  
26               of Action for Failure to Pay Compensation  
27               for All Hours Worked

28       Plaintiff's first, second, third, and fourth causes

1 of action are predicated upon the non-payment of wages  
2 and compensation. However, Plaintiff has not provided  
3 evidence that Defendant was responsible for  
4 determination of payment of wages. Defendant has  
5 provided evidence that it was not responsible for  
6 determination of wages or compensation to be provided  
7 to drivers. Rather, SCI simply took the amounts given  
8 to it by its clients and remitted those amounts to the  
9 drivers (SUMF 20). Plaintiff's only response to this  
10 statement of fact is "Irrelevant" (Plaintiff's  
11 Statement of Genuine Issues 20). Plaintiff does not  
12 submit evidence that Defendant's role was anything more  
13 than an administrative process whereby payments were  
14 processed in amounts set and given by clients,  
15 including California Overnight. In fact, Plaintiff  
16 herself has stated that California Overnight, not SCI,  
17 determined the amount of compensation owed to drivers  
18 through the settlement payments (SUMF 21).

19 As such, Plaintiff has not provided any evidence to  
20 create a genuine issue of material fact to show that  
21 the actions of Defendant SCI or its agents were  
22 responsible for the alleged wrongful actions  
23 constituting the first four causes of action regarding  
24 compensation and wages. Defendant is therefore  
25 entitled to summary judgment on these claims.<sup>1</sup>

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26  
27 <sup>1</sup> Plaintiff also argues that an employer-employee  
28 relationship existed with Defendant SCI and this could

1           2. Fifth Cause of Action for Unlawful

2           Discrimination, Cal. Gov't Code § 12940

3           Plaintiff's fifth cause of action for unlawful  
4 discrimination under California law is predicated upon  
5 her termination from employment. Plaintiff's response  
6 to Special Interrogatory 15 lays out the basis of this  
7 allegation:

8           Q: State all facts regarding any incident, conduct  
9           or statement that YOU believe constitutes the  
10          discrimination YOU allegedly suffered while YOU  
11          were performing services for Defendant.

12          A: When Plaintiff decided to ask for transfer to  
13          the office in Burbank, Ballard sent emails to  
14

15 \_\_\_\_\_  
16 form the basis of a claim under these causes of action  
17 if true. As proof of this employment relationship,  
18 Plaintiff points to various admissions by Defendant  
19 that it had "contractual relations" with Plaintiff.  
20 While these contractual relations may be a basis for a  
21 breach of contract claim, they likely are not a basis  
22 for a wage and hour claim under the Fair Labor  
23 Standards Act because of the requirement that there be  
24 an employer-employee relationship. This argument  
25 regarding an employer-employee relationship is  
26 discussed below.  
27  
28



1 T. Bourne, and consequently she was fired.  
2 Plaintiff felt discriminated against because  
3 even though she knew how to do a well job  
4 [sic], she had worked for Defendant for about 4  
5 years, they fired her because of Ballard's [sic]  
6 comments.

7 It is undisputed that both John Ballard and Tony  
8 Bourne were never employees or agents of Defendant SCI  
9 (Plaintiff's Statement of Genuine Issues 27-28).

10 Ballard is allegedly a former employee of California  
11 Overnight and Bourne is a current employee. Plaintiff  
12 fails to provide any evidence that connects these  
13 allegedly wrongful actions to Defendant SCI.

14 3. Sixth Cause of Action for Termination in  
15 Violation of Public Policy; Eighth Cause  
16 of Action for Unlawful Retaliation, Cal.  
17 Gov't Code § 12940

18 Plaintiff's claims for unlawful termination and  
19 retaliation in violation of public policy and  
20 California law are predicated upon actions taken by  
21 California Overnight, and not Defendant SCI. During  
22 her deposition, Plaintiff admitted as much:

23 Q: And why did you stop working for California  
24 Overnight in Burbank?

25 A: They fired me.

26 Q: Explain to me what happened. Did somebody tell  
27 you something?

28 A: I was called to the office with Tony Bourne,

1 the general manager, and my master, who was  
2 Ernesto Herrera, and I was only told that they  
3 could not give me any work anymore. They did  
4 not give me any note or anything. It was only  
5 verbal. And that's it.

6 Deposition of Maria Teresa Scott 48:6-15. Plaintiff  
7 also was asked through interrogatories to state "all  
8 facts regarding any incident, conduct or statement that  
9 YOU believe constitutes retaliation YOU allegedly  
10 suffered while YOU were performing services for  
11 Defendant." In response, Plaintiff stated "Plaintiff  
12 was fired as a result of comments made by B. Ballard  
13 [sic] to T. Bourne, and not due to any work related  
14 reasons." As noted above, both Ballard and Bourne were  
15 employees of California Overnight and not Defendant  
16 SCI.

17 Therefore, Plaintiff's claims involve an alleged  
18 termination by non-Defendant California Overnight and  
19 allege actions taken by two individuals whom she does  
20 not connect with SCI. Therefore, the actions should  
21 not be imputed to Defendant and summary judgment should  
22 be granted on these claims.

23 4. Seventh Cause of Action for Sexual  
24 Harassment, Cal. Gov't Code § 12940; Ninth  
25 Cause of Action for Failure to Prevent  
26 Sexual Harassment, Cal. Gov't Code § 12940

27 Plaintiff's claims alleging sexual harassment are  
28 also predicated upon the actions of a non-Defendant,

1 Mr. Ballard (Responses to Interrogatories 7,10,13).  
2 Plaintiff was asked to "identify all employees of  
3 Defendant who sexually harassed YOU, as alleged in  
4 Paragraph 68 of the COMPLAINT," to which she responded  
5 "John Ballard."

6 Plaintiff also claims failure to prevent sexual  
7 harassment, a claim which is tethered to her sexual  
8 harassment claim. This claim alleges that "there was  
9 improper supervision of the management personnel who  
10 harassed her, and that said management personnel was  
11 not given adequate sexual harassment training" (SUMF  
12 34). Again, Plaintiff has not made the required  
13 connection between the actor, John Ballard, and  
14 Defendant SCI. It is undisputed that John Ballard  
15 never worked for SCI. Therefore, summary judgment  
16 should be granted as to these claims for sexual  
17 harassment and failure to prevent sexual harassment  
18 against Defendant SCI.

19 5. Tenth Cause of Action for Labor Code  
20 Private Attorney General Act of 2004, Cal.  
21 Labor Code §§2698-2699.5; Eleventh Cause  
22 of Action for Unfair Competition, Cal.  
23 Bus. & Prof. Code § 17200

24 Plaintiff's tenth and eleventh causes of action  
25 under the Private Attorney General Act and the Unfair  
26 Competition Laws are attached to the above claimed  
27 violations of federal and state law. Therefore, these  
28 claims either succeed or fail with the success or

1 failure of the first nine causes of action. Because  
2 summary judgment is granted on the above claims,  
3 summary judgment is appropriate for these claims as  
4 well.

5 As laid out above, the actions complained of do not  
6 seem to relate to Defendant SCI. Rather, the actions  
7 complained of are linked to non-defendant California  
8 Overnight. It is unclear why Plaintiff brought claims  
9 against SCI and not California Overnight. The facts as  
10 pled in the Complaint and as laid out by the parties in  
11 the briefing on this Motion are bare as to the  
12 relationships between Defendant SCI, Plaintiff Scott,  
13 and California Overnight. However, as pled and  
14 briefed, Plaintiff has not made an adequate connection  
15 between the actions complained of and Defendant SCI.  
16 This deficiency is not addressed by Plaintiff in her  
17 Opposition. Instead Plaintiff focuses on the argument  
18 over whether Plaintiff was an employee or an  
19 independent contractor.

#### 20 C. Employment Relationship

21 Defendant argues that if the above analysis is not  
22 sufficient to grant summary judgment, summary  
23 adjudication is appropriate on Plaintiff's claims that  
24 require an employment relationship. Plaintiff does not  
25 deny that her First (Federal Wage and Hour), Second  
26 (Willful Federal Wage and Hour), Third (Unpaid Minimum  
27 Wage), Fourth (Failure to Compensate), Fifth  
28 (Discrimination), Sixth (Termination), and Tenth

1 (Private Attorney General) Causes of Action require an  
2 employment relationship. Rather, Plaintiff contends  
3 that the requisite employment relationship was present.  
4 Defendant does dispute that her Eleventh Cause of  
5 Action (Unfair Competition) requires an employment  
6 relationship.

7 Defendant argues that although there were  
8 contractual relations between itself and Plaintiff,  
9 there was no employment relationship because Plaintiff  
10 was, at most, an independent contractor.

11 1. Legal Standard - Employment Relationship

12 The Fair Labor Standards Act ("FLSA") defines the  
13 terms "employee" and "employer." Under the Act,  
14 "employee means any individual employed by an  
15 employer." FLSA, 29 U.S.C. § 203(e)(1). The term  
16 "employer includes any person acting directly or  
17 indirectly in the interest of any employer in relation  
18 to an employee . . ." 29 U.S.C. § 203(d).

19 Under the Fair Labor Standards Act ("FLSA"), courts  
20 adopt an expansive interpretation of the terms  
21 "employer" and "employee." Real v. Driscoll Strawberry  
22 Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979).  
23 "The FLSA's definition of 'employee' has been called  
24 the 'broadest definition that has ever been included in  
25 any one act.'" Nash v. Resources, Inc., 982 F. Supp  
26 1427, 1433 (D. Or. 1997); Rutherford Food Corp. v.  
27 McComb, 331 U.S. 722, 728 (1947). Therefore, the  
28 common law concepts of "employee" and "independent

1 contractor" are not conclusive determinations under the  
2 FLSA. Real, 603 F.2d at 754.

3 Courts have identified various factors which can be  
4 helpful in distinguishing an independent contractor  
5 from an employee. These factors include:

- 6 1. The degree of the alleged employer's right  
7 to control the manner in which the work is  
8 to be performed;
- 9 2. The alleged employee's opportunity for  
10 profit or loss depending upon his  
11 managerial skills;
- 12 3. The alleged employee's investment in  
13 equipment or materials required for his  
14 task, or his employment of helpers;
- 15 4. Whether the service rendered requires a  
16 special skill;
- 17 5. The degree of permanence of the working  
18 relationship; and
- 19 6. Whether the service rendered is an  
20 integral part of the alleged employer's  
21 business.

22 Real v. Driscoll Strawberry Associates, Inc., 603 F.2d  
23 748, 754 (9th Cir. 1979) (finding that the district  
24 court erred in finding that plaintiff did not raise a  
25 genuine issue of material fact as to whether plaintiff  
26 was an employee under the FLSA). This test is  
27 generally described as an "economic realities test"  
28 which focuses on the realities of an arrangement rather

1 than the "subjective intent of the parties to a labor  
2 contract." Id. at 755.

3 2. Estoppel

4 Plaintiff first contends that Defendant should be  
5 estopped from denying an employment relationship  
6 because of prior statements made by Defendant in papers  
7 filed with this Court and elsewhere.

8 Before bringing this lawsuit, Plaintiff filed  
9 claims with both the California Department of Fair  
10 Employment & Housing and the California Labor &  
11 Workforce Development Agency against Defendant SCI as  
12 her employer. SCI did not respond to either of these  
13 complaints. Plaintiff argues that by not responding to  
14 these claims, Defendant essentially admits that it was  
15 in fact Plaintiff's employer, and therefore should be  
16 estopped from denying such an allegation at this time.

17 In addition, Plaintiff points to assertions made in  
18 Defendant's Notice of Removal. The Notice asserts that  
19 "In the instant action, all of the claims in  
20 Plaintiff's Complaint relate to Plaintiff's contractual  
21 relationship with Defendant where by she agreed to  
22 perform services and did in fact perform services for  
23 Defendant." Notice ¶ 11. Also, Defendant's Chief  
24 Operating Officer, Robert Slack, declared at the time  
25 of removal that "Defendant contracted with Plaintiff  
26 Maria Teresa Scott for the performance of delivery  
27 services for approximately nine months in 2007." Slack  
28 Decl. to Notice of Removal ¶ 9.

1 Plaintiff argues that Defendant is for the first  
2 time denying an employment relationship in this Motion.  
3 Because discovery has concluded and the case has  
4 evolved to summary judgment, Plaintiff claims prejudice  
5 in permitting Defendant to now deny that it had an  
6 employment relationship with Plaintiff. Plaintiff  
7 argues it reasonably relied on these claims to its  
8 detriment by not adding California overnight as a Doe  
9 Defendant.

10 Plaintiff's argument is unpersuasive. First, this  
11 is not the first denial of an employment relationship.  
12 In Defendant's Answer, Defendant raises numerous  
13 affirmative defenses, including "Defendant contends  
14 that, at all times relevant to the Complaint, Plaintiff  
15 was not and is not an employee of Defendant, and thus  
16 the Complaint does not state any causes of action  
17 against Defendant." Answer ¶ 111. Defendant also  
18 claims as a separate affirmative defense, "Defendant  
19 contends that Plaintiff was an independent contractor  
20 of Defendant and as such is not entitled to any relief  
21 for the claims she has brought against Defendant in the  
22 Complaint." Answer ¶ 112. Furthermore, there are  
23 numerous mentions of California Overnight in  
24 depositions, responses to interrogatories, and in  
25 Plaintiff's general knowledge prior to bringing this  
26 lawsuit. She therefore cannot genuinely claim that she  
27 did not know that California Overnight may have been a  
28 proper defendant in this action.



1 Second, these assertions do not amount to admission  
2 of an employment relationship. The statements made by  
3 Defendant in court documents and in declarations amount  
4 to an admission that Defendant contracted with  
5 Plaintiff for performance of services. These  
6 statements are consistent with an independent  
7 contractor relationship, and do not necessarily admit a  
8 statutory employment relationship.

9 As to the claims filed with the California agencies  
10 prior to filing this claim, Defendant did not submit  
11 any response to these claims, and was under no  
12 obligation to do so. Had Defendant submitted a  
13 response and failed to deny an employment relationship,  
14 this argument may have had some weight. However,  
15 Defendant should not be estopped from denying an  
16 employment relationship because it failed to submit a  
17 response when it was under no obligation to do so.  
18 Therefore, Plaintiff's estoppel argument is not  
19 persuasive, and an analysis of whether an employment  
20 relationship existed is warranted.

### 21 3. State Court Adjudication

22 Defendant argues that the Court need not consider  
23 the factors for determining an employment relationship  
24 because Plaintiff's status as an independent contractor  
25 has already been determined as a matter of law. In  
26 Christler v. Express Messenger Systems, Inc., 171 Cal.  
27 App. 4th 72 (2009), the California Court of Appeal  
28 affirmed a trial court's judgment pursuant to a jury

1 determination that class members were properly  
2 classified as independent contractors of California  
3 Overnight, rather than employees. The certified class  
4 in the action included all delivery drivers for Express  
5 Messenger Systems, Inc., d/b/a California Overnight,  
6 from November 30, 2002 through March 28, 2005.  
7 Plaintiff falls within this defined class.

8 Plaintiff argues that this state court case shows  
9 that a jury should determine the issue, rather than the  
10 Court on summary judgment. This argument is somewhat  
11 supported by the case itself which notes that "the  
12 determination of employee or independent-contractor  
13 status is one of fact." Cristler, 171 Cal. App 4th at  
14 78. The California Court of Appeal also noted, in a  
15 footnote:

16 Cristler emphasizes throughout its briefing that  
17 *other cases* addressing the proper classification of  
18 package delivery drivers have resulted in finding  
19 that the drivers were employees, rather than  
20 independent contractors . . . The simple answer to  
21 these references is that these cases concerned  
22 different circumstances presented to a different  
23 finder of fact. Indeed, even if the facts of this  
24 case were *identical* to those in cases Cristler  
25 cites (and they are not), we would not be  
26 authorized to overrule the determination of the  
27 jury . . .

28 Cristler, 171 Cal. App. 4th 78, n.2 (emphasis in

1 original).

2 Furthermore, the Cristler case dealt with a  
3 somewhat different issue than the one before this  
4 Court. The issue in Cristler was whether the drivers  
5 were independent contractors or employees of *California*  
6 *Overnight*. The issue before this Court is whether a  
7 driver is an independent contractor or employee of *SCI*.

8 Lastly, Cristler was a state court case to  
9 determine whether the class of drivers were employees  
10 under the California Labor Code. It was a question of  
11 California Law determined by the California courts. In  
12 this case, on the other hand, part of the issue is  
13 whether a driver should be considered an employee under  
14 Federal law. These are distinct questions and should  
15 be determined separately. Therefore, although the  
16 California Court of Appeal has held that the class of  
17 California Overnight drivers are independent  
18 contractors under state law, this ruling is not res  
19 judicata on this Court for Plaintiff's claims arising  
20 under Federal law.

#### 21 4. Factors

22 As noted above, some relevant factors to consider  
23 in determining an employment relationship include:

- 24 1. The degree of the alleged employer's right to  
25 control the manner in which the work is to be  
26 permitted;
- 27 2. The alleged employee's opportunity for profit  
28 or loss depending upon his managerial skills;

- 1        3.    The alleged employee's investment in equipment
- 2            or materials required for his task, or his
- 3            employment of helpers;
- 4        4.    Whether the service rendered requires a special
- 5            skill;
- 6        5.    The degree of permanence of the working
- 7            relationship; and
- 8        6.    Whether the service rendered is an integral
- 9            part of the alleged employer's business.

10 Real v. Driscoll Strawberry Associates, Inc., 603 F.2d  
11 748, 754 (9th Cir. 1979). The most probative factor is  
12 the right and ability to control the manner of work.  
13 NLRB v. Friendly Cab Co., 512 F.3d 1090, 1096-97 (9th  
14 cir. 2008).

15        Defendant points out that Plaintiff herself has  
16 claimed that she was employed by California Overnight,  
17 and claims that the "undisputed facts show that SCI did  
18 not exercise any control over the courier services that  
19 Plaintiff performed" (Motion at 14). Defendant  
20 provides references to Plaintiff's deposition and  
21 responses to interrogatories that show she believed she  
22 was employed by California Overnight, and had very  
23 little contact with Defendant SCI. She has stated that  
24 she assumed SCI only dealt with the settlement payments  
25 and was unaware of any other matters under SCI's  
26 control. In her deposition, she stated:

27        Q:    Were you familiar with a company called  
28            SubContracting Concepts, Inc.?

1 A: Yes. They were the ones who made the checks  
2 for us.

3 Q: Other than making out the checks, did  
4 SubContracting Concepts, Inc., do anything else  
5 for you?

6 A: No, as far as I know.

7 Scott Deposition 127:15-21. The Deposition continues:

8 Q: Did you ever have any communications with  
9 anyone at SubContracting Concepts, Inc., about  
10 deliveries?

11 A: No.

12 Q: Did anyone from SubContracting Concepts, Inc.,  
13 ever communicate with you about when you should  
14 come to work or where you should make  
15 deliveries?

16 A: No. The only people who contacted me was the  
17 people in the office where I worked. So I knew  
18 the people who would be calling me.

19 Q: They were people from California Overnight?

20 A: Yes, the office where I assisted every day. I  
21 never met personally anybody from the office of  
22 SCI.

23 Q: And the contacts you had with persons in the  
24 office at California Overnight, were those  
25 people you identified during the first day of  
26 your deposition, people such as Maurice  
27 Johnson, the dispatcher in Inglewood, John  
28 Ballard, Ernesto Herrera, Jose Rios, people

1           like that?

2           A: Yes, and also other dispatchers.

3           Q: At California Overnight?

4           A: Yes.

5           Q: Did you ever have any discussions or  
6           negotiations with anyone at SubContracting  
7           Concepts, Inc., about the money you made for  
8           doing deliveries?

9           A: The money that I was making, it was not  
10          negotiable. They put the price. I didn't.

11          Q: Who put the price? California Overnight?

12          A: Of course.

13         Scot Declaration 129:14-130:18.

14                 However, Plaintiff now attempts to enter into the  
15         record on summary judgment evidence which is  
16         substantially contradictory. Despite these previous  
17         assertions made by Plaintiff at the time of her  
18         deposition, she has now submitted a Declaration with  
19         her Opposition which attempts to establish the facts  
20         necessary to show an employment relationship under the  
21         "economic realities test" and the factors noted above.  
22         In her Declaration, Plaintiff attests to the following:

23                 1. With respect to control of the details and  
24                 result of my work, I did not set my own  
25                 schedule. I was required by SCI to be at work  
26                 every morning at 6:00 a.m. in the Inglewood  
27                 location. In the Burbank location I was  
28                 required to show up at 5:15 in the morning . .

- 1 . I was not allowed to change the number of  
2 hours I worked. My progress in making  
3 deliveries was tracked by SCI through the  
4 digital scanning process . . . I was not free  
5 to use a replacement driver . . . SCI would  
6 determine who would assist me . . .
- 7 2. As to the right of Defendant to discharge me at  
8 will, it was my understanding that I could be  
9 let go from work at any time.
- 10 3. As to my being engaged in a distinct occupation  
11 or business, I do not have my own customers, do  
12 not advertise . . .
- 13 4. With respect to the skills required for my  
14 occupation, I do have some knowledge regarding  
15 general geography, however, I cannot say that I  
16 am any kind of expert . . . Many of the drivers  
17 are "unskilled" . . .
- 18 5. As to the length of time for which my services  
19 were to be performed, I am not aware of  
20 successive contracts based on performance but  
21 rather was employed based on the needs of the  
22 business of Defendant.
- 23 6. As to the method of payment, I was paid by  
24 Defendant through direct deposit . . . in  
25 Burbank . . . In the Inglewood location, I  
26 would receive paychecks.
- 27 7. As to my work for Defendant as part of its  
28 regular business, SCI, which represented to me

1 in writing that it was in the business of  
2 brokering courier and messengers to various  
3 accounts, including California Overnight.

4 8. As to my belief that I was an employee of  
5 Defendant, I did not accept an offer to become  
6 an independent contractor after working several  
7 months in 2007.

8 9. As to my opportunity to earn profit or loss on  
9 my managerial skill, I did not have the ability  
10 to negotiate my compensation based on bidding  
11 for jobs. My compensation was based more on  
12 how far the deliveries were. Nor was I allowed  
13 to work for other delivery companies.

14 10. As to my use of helpers/replacement, I never  
15 used such other drivers. When I was unable to  
16 work due to illness, the company would simply  
17 assign my work to other drivers so that I would  
18 not earn anything on these days.

19 11. In sum, I was not free to set my own schedule,  
20 my own business, or my own work, in the manner  
21 that I deemed most profitable for me, rather, I  
22 was directed to perform my work as an employee  
23 in a specific manner, wearing a uniform and  
24 making periodic reports on my work.

25 Scott Declaration ¶ 1-11.

26 For summary judgment purposes, the non-moving  
27 party's facts must be taken as true. See Real v.  
28 Driscoll Strawberry Associates, Inc., 603 F.2d 748, 755



1 (9th Cir. 1979) ("The appellants' affidavits, which  
2 must be taken as true for summary judgment purposes,  
3 plainly disclose that Driscoll possesses substantial  
4 control over important aspects of the appellants'  
5 work."). If true, these facts asserted in Plaintiff's  
6 Declaration may preclude summary judgment on the issue  
7 of the employer-employee relationship.

8 However, Plaintiff seems to contradict much of her  
9 earlier deposition testimony in this Declaration.  
10 While the Court is not to consider the weight of  
11 proffered evidence, and is only to consider its  
12 existence, the non-moving party must submit more than a  
13 "mere scintilla of evidence" to support her position.  
14 Anderson v. Liberty Lobby, 477 U.S. 242, 252. Rather,  
15 "there must be evidence on which the jury could  
16 reasonably find for [Plaintiff]." Id. The question  
17 therefore becomes whether these allegations made in the  
18 Declaration are enough for a reasonable jury to find  
19 for Plaintiff on each of her claims, in the face of her  
20 earlier assertions to the contrary.

21 The Ninth Circuit has held that a non-moving party  
22 to a summary judgment motion cannot create an issue of  
23 fact by creating a contradiction with her own prior  
24 deposition testimony. Radobenko v. Automated Equipment  
25 Corp., 520 F.2d 540, 544 (9th Cir. 1975) (noting that  
26 "if a party who has been examined at length on  
27 deposition could raise an issue of fact simply by  
28 submitting an affidavit contradicting his own prior

1 testimony, this would greatly diminish the utility of  
2 summary judgment as a procedure for screening out sham  
3 issues of fact." ).

4       However, this rule has its limits. The Ninth  
5 Circuit has noted that "the *Foster-Radobenko* rule does  
6 not automatically dispose of every case in which a  
7 contradictory affidavit is introduced to explain  
8 portions of earlier testimony." Kennedy v. Allied  
9 Mutual Ins. Co., 952 F.2d 262, 266-67 (9th Cir. 1991).  
10 Therefore, before applying the Radobenko rule, the  
11 Court must make a factual determination that the  
12 contradiction was actually a "sham." Nelson v. City of  
13 Davis, 2009 WL 1925909, at \*3 (9th Cir. July 7, 2009);  
14 Kennedy, 952 F.2d at 267.

15       In addition, the "sham affidavit" rule does not  
16 preclude a non-moving party from "elaborating upon,  
17 explaining or clarifying prior testimony elicited by  
18 opposing counsel on deposition" and that "minor  
19 inconsistencies that result from an honest discrepancy,  
20 a mistake, or newly discovered evidence afford no basis  
21 for excluding an opposition affidavit." Nelson, 2009  
22 WL 1925909, at \*3 (quoting Scamihorn v. Gen. Truck  
23 Drivers, 282 F.3d 1078, 1086 n.7 (9th Cir. 2002)).

24       In this instance, the facts are not minor  
25 inconsistencies, but plainly contradict prior testimony  
26 at deposition. Plaintiff previously testified as to  
27 the belief she was employed by California Overnight,  
28 interacted only with California Overnight, had her

1 rates determined by California Overnight, and various  
2 other statements which connect her only with California  
3 Overnight, and not to Defendant SCI. The statements  
4 made in the later Declaration flatly contradict these  
5 prior statements and therefore seem to constitute a  
6 "sham affidavit." Accordingly, the allegations made in  
7 this Declaration should not prevent summary judgment in  
8 favor of Defendant SCI.

9 III. Conclusion

10 Based on the above the analysis, Defendant's Motion  
11 for Summary Judgment is **GRANTED**. Plaintiff's  
12 substantive Claims for Relief 1-9 are dismissed on the  
13 basis of the lack of connection between the alleged  
14 violations and Defendant SCI. Plaintiff has not put  
15 forth evidence showing a connection between the  
16 aggrieved conduct and Defendant SCI, nor has she put  
17 forth sufficient evidence to show a genuine issue of  
18 fact as to whether SCI was Plaintiff's employer.  
19 Because the substantive claims fail, attached Claims  
20 for Relief 10 and 11 fail as well. The Motion for  
21 Summary Judgment is therefore **GRANTED** in its entirety.

22  
23 **IT IS SO ORDERED.**

24  
25 DATED: July 27, 2009

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27 / s /

28 **HONORABLE RONALD S.W. LEW**  
Senior, U.S. District Court Judge

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